Bases of Slander Per Se in Ohio

The action of slander was first considered to be cognizable only in the ecclesiastical courts of England because it was a spiritual matter. Later when the common law courts of England began to take jurisdiction over the action of slander the emphasis was placed on temporal damages to the defamed individual because the common law courts did not want to invade ecclesiastical law.[1] Therefore the general rule developed that slander would not be actionable without proof of special damages. This general rule did not stand very long before certain exceptions were read into it. Since the exceptions did not require proof of special damages the distinction between slander *per se* and slander *per quod* arose.

The early imputations which formed the exceptions are imputations of a crime, contagious disease, or unfitness for trade, profession, office, or calling. The fact that these imputations became exceptions to the rule are based on the idea that from an imputation of this kind actual damage can be presumed.[2] Imputation of a crime as being actionable *per se* was probably the first exception to be recognized in that it dated back to the days when the courts were trying to determine which words would be actionable in the common law courts and which words would be actionable in the ecclesiastical courts. The other two categories seem to have developed later and are probably based on the obvious tendency for such an imputation to cause damage or temporal loss.[3]

In the United States these specific categories have been generally accepted. The Supreme Court in *Pollard v. Lyon*,[4] after reviewing the cases, laid down five classes which would give a cause of action for oral slander. They are:

> (1) Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, when, if the charge is true, it would exclude the party from society; or (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words

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[1] PROSSER, TORTS §92 (1941).

[2] Holdsworth, *Defamation in the 16th and 17th Centuries*, 40 L. Q. REV. 397, 398 (1924).

[3] *Id.* at 398-400.

[4] 91 U.S. 225, 226 (1875).

> falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

It is immediately noticed that all of the classes, with the exception of the last, are actionable *per se*.

During the same year the Supreme Court of Ohio also laid down a similar set of rules.[5] To these exceptions, Ohio has also added an imputation of unchastity to a girl or woman.[6] This comment will treat each of these exceptions individually with special reference to Ohio law.

Imputation of Crime

For many years in America and in England the law was uncertain as to what words were actionable *per se*. This uncertainty caused the courts to attempt a formula that would be not only simple and comprehensive but also easy in practical application. Out of these attempts emerged a formula that has become accepted as the American rule. The rule was laid down in the case of Brooker v. Coffin[7] and it read as follows:

> In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment then the words will be in themselves actionable.

Even though one Ohio case broadly and unqualifiedly states that an oral imputation of a crime is actionable *per se*,[8] the American rule can be considered as the settled law in Ohio.[9] It is seen from looking at the rule that it is not always prima facie actionable to impute to a person an act which is subject to indictment and punishment. Rather, importance is attached to the inherent nature of the indictable act and to the punishment which the law assigns to it.[10] The reason for making some distinction as to the nature of the crime was considered necessary because of the extension of criminal punishment to many minor offenses, the violation of which would not exclude the person from society.

The first of the two necessary elements of the rule as formulated in *Brooker v. Coffin*, and accepted in Ohio, is that an indictable crime must be charged before the words are actionable *per se*.[11] An "indictable offense," as defined in Ohio, is any offense that is punishable in our temporal courts having criminal jurisdiction,

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[5] *Infra*, p. 322.

[6] Barnett v. Ward, 36 Ohio St. 107 (1880); Ohio Rev. Code §2901.37 (13383).

[7] 5 Johns. (N.Y.) 188 (1809).

[8] Fox v. Eagle, Dayton 135 (1868).

[9] Davis v. Brown, 27 Ohio St. 326 (1875); Hollingsworth v. Shaw, 19 Ohio St. 430 (1869); Alfele v. Wright, 17 Ohio St. 238 (1867); Dial v. Holter, 6 Ohio St. 228 (1856); Hughey v. Bradrick, 39 Ohio App. 486, 177 N.E. 911 (1931); Landis v. Caylor, 5 Ohio Nisi Prius 216 (1898).

[10] Cooley, Torts §139 (4th ed. 1932).

[11] *Supra*, n. 9.

either by indictment or information.[12] Thus it is not slander *per se* to charge a partner with entering and carrying away partnership property because he cannot burglarize partnership property.[13] Likewise an imputation of a crime that is cognizable only in a military court is not actionable without averment of special damages because it does not charge an indictable crime.[14] Years ago an Ohio court held that words imputing a charge that involved moral turpitude, which at common law would have subjected the guilty person to infamous punishment, were actionable *per se* even though the charge was not a statutory crime in Ohio.[15] In spite of this general statement, the Ohio courts have not enlarged the American rule and still hold that the words must impute a crime that is an indictable offense involving moral turpitude or must subject the offender to infamous punishment.[16] Since the original reason for making the imputation of a crime an exception to the common law rule was that such imputation would place the person charged in danger of criminal prosecution,[17] it therefore follows that an imputation of mere criminal intent would not be actionable *per se* because criminal intent in and of itself is not a criminal offense.[18] Later when the emphasis shifted from danger of criminal prosecution to social ostracism,[19] accusations of criminal conduct for which the punishment had been inflicted, [20] or for which there had been a pardon,[21] or for which prosecution had been barred by the statute of limitations[22] would support an action for slander without alleging special damages. This conclusion is arrived at because even though the person charged with the criminal act is immune from any punishment for such act, still his reputation may be damaged

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[12] Zehring v. Zehring, 1 Dayton Term. Rep. (Iddings) 25 (1899).

[13] Alfele v. Wright, 17 Ohio St. 238 (1867).

[14] Hollingsworth v. Shaw, 19 Ohio St. 430 (1869).

[15] Alfele v. Wright, 17 Ohio St. 238 (1867).

[16] Davis v. Brown, 27 Ohio St. 326 (1875); Hamm v. Wickline, 26 Ohio St. 81 (1875); Hollingsworth v. Shaw, 19 Ohio St. 430 (1869); Hughey v. Bradrick, 39 Ohio App. 486, 117 N.E. 911 (1931); Phillips v. LeJune, 1 Ohio Cr. Ct. (N.S.) 616 (1903).

[17] PROSSER, TORTS §92 (1941).

[18] Bollenbacher v. Society for Savings, 148 Ohio St. 649, 76 N.E. 2d 866 (1947); Seaton v. Corday, Wright 101 (1832); 33 AM. JUR. LIBEL AND SLANDER §13 (1948); RESTATEMENT OF TORTS §571 Comment c (1938).

[19] In Alfele v. Wright, 17 Ohio St. 238, 241 (1867) the court states that it is not jeopardy of punishment, but injury to the reputation which constitutes the ground of action for slander.

[20] Michael v. Matheis, 77 Mo. App. 556 (1898).

[21] Shipp v. McCraw, 7 N.C. 463 (1819).

[22] Webb v. Fitch, 1 Root (Conn.) 544 (1793); Brightman v. Davies; 3 N.J. Misc. 113, 127 Atl. 327 (1925); Van Ankin v. Westfall, 14 Johns. (N.Y.) 233 (1817).

in the eyes of the public. Since the requirement of the rule is that an indictable crime must be charged, if words that would otherwise impute an indictable crime are understood by all who hear them that they are not intended to charge a crime, they are not actionable *per se*;[23] but if the statement would naturally and presumably be understood as charging an indictable crime, the words are actionable *per se*.[24]

The second necessary element of the rule is that the indictable offense charged must involve a high degree of moral turpitude or subject the party to infamous punishment. The necessity of attaching importance to the nature of the act and the punishment assigned to it is that social degradation might result from either one of them.[25] Although a number of courts consider this second element alone as a sufficient basis for an action of slander,[26] the majority of the courts follow the rule in *Brooker v. Coffin* and require that both elements be present before the words are actionable *per se*. Thus in Ohio, before sodomy was made a statutory crime,[27] to charge a man with committing such an act was not actionable without allegation of special damages.[28] The court conceded that the charged act involved the highest degree of immorality and would tend to exclude such person from society, but since this act was not declared by the legislature to be a crime it was not actionable *per se*. Likewise words charging crimes of desertion[29] or burglary of partnership property by a partner[30] involve high degrees of moral turpitude but they cannot be the basis of slander *per se* because the offenses are not indictable. In order to come within the provisions of these two elements it is not necessary that the crime charged be a felony in that an indictable misdemeanor involving moral turpitude will satisfy the rule.[31] On the contrary, words that impute misdemeanors which do not involve moral turpi-

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[23] Brown v. Meyers, 40 Ohio St. 99 (1883); Phillips v. LeJune, 1 Ohio Cir. Ct. (N.S.) 616 (1903); Stone v. Ruthman, 21 Ohio Nisi Prius (N.S.) 562 (1919); Tedtman v. Hancock, 1 Ohio Cir. Ct. 238 (1885).

[24] Schoedler v. Motometer Gauge and Equip. Co., 134 Ohio St. 78, 15 N.E. 2d 958 (1938).

[25] 53 C.J.S. Libel and Slander §53 (1948).

[26] Larson v. R. B. Wrigley Co., 183 Minn. 28, 235 N.W. 393 (1931); Kelly v. Flaherty, 16 R.I. 234, 14 Atl. 876 (1888).

[27] Sodomy has been declared a crime by OHIO REV. CODE §2905.44 (13043) and the punishment is imprisonment of not less than one nor more than twenty years.

[28] Melvin v. Weiant, 36 Ohio St. 184 (1880); Davis v. Brown, 27 Ohio St. 326 (1875).

[29] Hollingsworth v. Shaw, 19 Ohio St. 430 (1869).

[30] Alfele v. Wright, 17 Ohio St. 238 (1867).

[31] Gray v. Wood, 7 Ohio Nisi Prius 606 (1900).

tude are not actionable *per se* because they do not meet the necessary second element of the rule.[32]

Even though the general rule as stated is adopted in a jurisdiction, it is still difficult to ascertain whether a given charge is sufficient to support an action for slander *per se* because of the vague definitions given to the words moral turpitude and infamous punishment. This is illustrated by the rule in Ohio which seems to state that any base or vile act that does not conform to the generally accepted rules of society, whether these rules are enforceable as legal obligations, involves moral turpitude.[33] Infamous punishment is generally assumed to mean imprisonment or death although the courts in the United States are not in full agreement as to what constitutes imprisonment. In some jurisdictions, imprisonment in the penitentiary as opposed to common jail is essential for infamous punishment.[34] Other jurisdictions hold that a crime punishable by a common jail sentence when imputed to a person is sufficient basis for an action of slander *per se*.[35] While the statutes of Ohio do not define any offense as infamous, felonies may, by analogy, be so regarded inasmuch as a conviction involves the loss of civil rights under OHIO REV. CODE § 2961.01 (12390).[36] Since all offenses which may be punished by death or imprisonment in the penitentiary are felonies,[37] it can be argued in Ohio that infamous punishment would not include confinement in a common jail.[38] In view of this, Ohio would probably go along with the courts that require confinement in a penitentiary or death to satisfy the requirement of infamous punishment.

The principles above discussed governing imputations of crime as slanderous *per se* will now be considered with reference to several specific crimes. As a general statement it can be said that a

[32] Landis v. Caylor, 5 Ohio Nisi Prius 216 (1898).

[33] Hughey v. Bradrick, 39 Ohio App. 486, 488-9, 177 N.E. 911, 912 (1931); In re Bostwick, 29 Ohio Nisi Prius (N.S.) 21, 29 (1931); Landis v. Caylor, 5 Ohio Nisi Prius 216, 217 (1898).

[34] Cline v. Holdrege, 122 Neb. 151, 239 N.W. 639 (1931); RESTATEMENT, TORTS §571 Comment (e) (f) (1938) which states: "The offense must be of a type which is punishable by death or imprisonment in the state or federal prison or like institution . . . (f) For an offense to be punishable by imprisonment 'other than in lieu of a fine' it must be possible for the punishment to be imposed directly and not collaterally for the failure to pay a fine. If the court may in its discretion impose either a fine or imprisonment or both, the offense is punishable by imprisonment."

[35] Le Moine v. Spicer, 146 Fla. 758, 1 So. 2d 730 (1941); Priest v. Central States Fire Ins. Co., 223 Mo. App. 122, 9 S.W. 2d 543 (1928); Early v. Winn, 129 Wis. 291, 109 N.W. 633 (1906).

[36] Stockum v. State, 106 Ohio St. 249, 139 N.E. 855 (1922).

[37] OHIO REV. CODE 1.06 (12372).

[38] Stockum v. State, 106 Ohio St. 249, 139 N.E. 855 (1922); Landis v. Caylor, 5 Ohio Nisi Prius 216 (1898).

false or malicious charge of perjury is actionable *per se*.[39] Ordinarily, it is necessary that it appear that some proceeding had been pending at which the person could have been sworn and could have been punished for perjury if his oath were false, but under the rules of pleading in Ohio it is unnecessary to allege this.[40] Since an accusation of perjury implies within itself everything necessary to constitute this offense it is not slander to charge one with swearing falsely, if it appears that the swearing was done before a court without competent jurisdiction.[41] Likewise the perjury charged must be on a subject which is important and material to an issue in the trial.[42] A charge of false swearing to be actionable *per se* must relate to some swearing, which if false, would constitute a crime of perjury.[43] The reason is that a person may have sworn to a falsehood but did not know at the time of the statement that it was false and therefore could not be convicted of the crime of perjury. These two crimes illustrate the necessity of an indictable crime being charged, element number one of the rule in *Brooker v. Coffin,* before the imputation can be slanderous *per se*. They also show that if the first element of the rule is complied with, the second would be too, because the crimes are ones subjecting the offender to a possible confinement in a penitentiary.

Oral statements charging arson, as defined by the common law or by statutes in those states which do not have common law crimes,[44] are actionable *per se*. Usually it is not actionable to charge a person with burning his own property, but in Ohio if the charge is that the property was burned with the intent to defraud an insurance company, the rule is otherwise.[45] This is because by statute the offense is made an indictable crime for which a penitentiary sentence can be given.[46] However in another jurisdiction, such a charge, although an indictable misdemeanor, was held not to be an infamous crime and therefore not actionable *per se*.[47] This case illustrates the fact that both elements of the rule in *Brooker v. Coffin* must be present before the imputation can be slanderous

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[39] Stickels v. Hall, 3 Ohio Cir. Ct. 398 (1888); OHIO REV. CODE §2917.25 (12842) makes the punishment for perjury imprisonment for not less than one nor more than ten years.

[40] Stickel v. Hall, 3 Ohio Cir. Ct. 398 (1888); OHIO REV. CODE §2941.18 (13437-17).

[41] Hamm v. Wickline, 26 Ohio St. 81 (1875); Willis v. Patterson, Tappan original 324, reprint 275 (1819).

[42] Wilson v. Oliphant, Wright 153 (1832).

[43] Hamm v. Wickline, 20 Ohio St. 81 (1875); Wilson v. Oliphant, Wright 153 (1832); Waggoner v. Richmond, Wright 173 (1932).

[44] For example see OHIO REV. CODE §2907.02 (12433).

[45] Hilbrant v. Simmons, 18 Ohio Cir. Ct. 123 (1898).

[46] OHIO REV. CODE §2907.03 (12433-1).

[47] Davis v. Carey, 8 Pa. Co. 578 (1889).

per se. To comply with the second element of the rule, it could be said that even though the misdemeanor did not subject the person to an infamous punishment it was one involving moral turpitude.

At one time in Ohio, the courts held that words charging a person with being a blackmailer were not actionable *per se* because they did not charge an indictable offense.[48] With the passage of a statute making blackmailing an indictable crime for which a penitentiary sentence could be imposed the cases have held that these words are actionable *per se*.[49]

To charge a woman with keeping a house of ill fame was at common law actionable without proof of special damages because it was an indictable offense. It would seem that keeping such a place could be construed as imputing a want of chastity and therefore come under that specific exception.[50] In Ohio this type of charge could also come under the exception for an oral imputation of a crime.[51] But since the punishment under the statute is a fine of not less than one hundred nor more than three hundred dollars and imprisonment of not less than ninety days nor more than six months, or both, this would not at first glance appear to be sufficient to meet the second element of *Brooker v. Coffin*. The second requirement could presumably be met by a finding that keeping a house of prostitution is an imputation of an indictable crime involving moral turpitude,[52] even though there is a dictum in an early Ohio case stating that an oral charge of keeping a house of prostitution is not actionable *per se*.[53] Although this is not an exhaustive list of the crimes in Ohio, it does show how the general principles are applied by the courts in rendering their decisions.

Imputation of Disease

At common law falsely spoken words to another which impute a presently existing loathsome or contagious disease are actionable without proof of special damages. The theory behind this second exception to the common law rule that slander is not actionable unless special damages are proved is that if the charge were true

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[48] Byers v. Forest, 4 Ohio Dec. Repr. 458 (1879).

[49] English v. English, 9 Ohio Dec. Repr. 167 (1883); Ohio Rev. Code §2901.38 (13384).

[50] *Infra*, p. 320.

[51] Ohio Rev. Code §2905.14 (13031) makes keeping a house of prostitution an indictable offense.

[52] Wilkens v. Hammann, 43 Misc. 21, 86 N.Y. Supp. 744 (1904); Posnett v. Marble, 62 Vt. 481, 20 Atl. 813 (1890).

[53] McDonald v. Durst, Dayton 249 (1868).

it would exclude the person so charged from society.[54] Although this theory is applicable to many cases, decisions do not indicate that such a broad application will be made of the theory.

The specific diseases included within the rule were leprosy and *lues venerea* (syphilis), although equally contagious diseases, such as smallpox, were not included.[55] A possible explanation is that originally leprosy and syphilis were considered as permanent, lingering and incurable whereas if the victim had smallpox he either recovered or died shortly after catching it. Occasionally reference is made to the plague as also being actionable *per se*, but there seems to be no reported case on it.[56] When the argument was advanced that gonorrhea should not be added to leprosy and syphilis because it was a different type of disease, the courts very properly held that this disease would exclude the person from society and therefore should be actionable *per se*.[57] But when the courts were confronted with an accusation of a disease like tuberculosis they held that it was not actionable without proof of special damages even though the person so charged would be somewhat excluded from society.[58] In jurisdictions that have statutes defining what constitutes slander *per se*, the courts can reach a contrary result for tuberculosis and similar diseases by virtue of the fact that the statutes are usually broader and can be interpreted to permit more actions than would have been possible under the strict common law classification of diseases.[59] An oral imputation of mental disease or insanity likewise does not come within the tort of slander without showing special damages.[60] These words are considered as mere vituperation or abuse.[61]

Even though the theory behind this exception is whole or partial exclusion from society, nevertheless according to the weight of authority today the disease charged must be a venereal disease. A particular word or words need not be used in describing the

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[54] Kaucher v. Blinn, 29 Ohio St. 62 (1875); 9 BACON ABR. 45 "Since man is a being formed for society, and standing in almost constant need of advice, comfort and assistance of his fellow-servants, it is highly reasonable that any words which import the charge of a contagious distemper should be in themselves actionable, because all prudent persons will avoid the company of one having such distemper."

[55] PROSSER, TORTS §92 (1941).

[56] Viller v. Monsley, 2 Wils. 403, 95 Eng. Rep. 886 (1769); Joannes v. Burt, 6 Allen (Mass.) 236 (1863).

[57] Watson v. McCarthy, 2 Ga. 57 (1847); Nichols v. Guy, 2 Ind. 82 (1850); Kaucher v. Blinn, 29 Ohio St. 62 (1875).

[58] Kassowitz v. Sentinel Co., 226 Wis. 468, 277 N.W. 177 (1938).

[59] Brown v. McCann, 36 Ga. App. 812, 138 S.E. 247 (1927); Kirby v. Smith, 54 S.D. 608, 224 N.W. 230 (1929).

[60] Joannes v. Burt, 6 Allen (Mass.) 236 (1863).

[61] Goldrick v. Levy, 8 Ohio Dec. Repr. 146 (1881).

imputed disease and so long as it is understood by the listeners to refer to a venereal disease the words are actionable *per se*.[62] There would be no social avoidance of a person who has had a venereal disease and consequently an oral imputation of a past venereal disease is not actionable *per se* unless the words impute a continuance of the disease at the time the words were spoken.[63]

Since Ohio has no statute defining what constitutes slander *per se* and has an early case holding that an oral imputation of a venereal disease is actionable without proof of special damages, Ohio can be considered as following the old strict requirement that the disease charged must be leprosy, plague, or a venereal disease. The first two mentioned diseases are no longer of any importance so the rule in Ohio is probably that only oral imputations of venereal disease are actionable *per se*.

Imputation of Unchastity

At English common law an oral imputation of unchastity to a woman was not actionable without proof of special damages because an imputation of such an act was only cognizable in the spiritual courts.[64] For these words to be actionable *per se*, according to the rule of Lord Holt, they must charge an offense for which an infamous punishment could be inflicted,[65] or as Lord Chief Justice DeGrey stated, they must impute some specific crime or misdemeanor.[66] Even if the offended female tried to prove special damages she had a difficult time because of the strict rules relating to special damages. The hardship of proving special damages was even greater for a married woman unless she owned her own business for usually her property was either in her husband's hands or vested in a trustee for her. The fact that her husband sustained special damages as a result of the defamatory words was not enough to give the wife a cause of action. Even the loss of the society of her friends or the consortium of her husband was not considered by the court as special damages.[67] The only excep-

[62] Calling a person a syphilitic degenerate or a syphilitic renegade is actionable *per se*. Mann v. Bulgin, 34 Idaho 714, 203 Pac. 463 (1921); Words charging the pox is actionable *per se* as an imputation of an infectious disease. Hewit v. Mason, 24 How. Pr. (N.Y.) 366 (1863), Williams v. Holdredge, 22 Barb. (N.Y.) 396 (1854); Imputing that one has the clap is also slanderous *per se*. Kaucher v. Blinn, 29 Ohio St. 62 (1875), Watson v. McCarthy, 2 Ga. 57 (1874), Nichols v. Guy, 2 Ind. 82 (1850), Sally v. Brown, 220 Ky. 576, 295 S.W. 890 (1927).

[63] Mann v. Bulgin, 34 Idaho 714, 203 Pac. 463 (1921); Iron v. Field, 9 R.I. 216 (1869); Pike v. Van Wormer, 5 How. Pr. (N.Y.) 171 (1850); Lowe v. De Hoog, 193 S.W. 969 (Mo. App. 1927).

[64] Roberts v. Roberts, 5 B. & S. 384, 122 Eng. Rep. 874 (1864).

[65] Turner v. Ogden, 2 Salk. 696, 91 Eng. Rep. 590 (1787).

[66] Onslow v. Horne, 3 Wils. 177, 95 Eng. Rep. 999 (1771).

[67] Lynch v. Knight, 9 H.L. Cas. 577, 11 Eng. Rep. 854 (1861).

tion to this rule was an action brought in the cities of London, Bristol and the borough of Southwark for words spoken within the jurisdiction of these courts.[68] Under the custom of these cities, a prostitute was "carted" and therefore to call a woman such a name would impute a criminal offense to her and the imputation would be slanderous *per se* in the common law courts. The common law rule denying recovery in almost all cases of imputations of unchastity unless special damages were proved was denounced by the English judges themselves.[69] As a result of this, the old English rule was changed in 1891 by the SLANDER OF WOMEN ACT.[70] This act of Parliament provided that words imputing unchastity or adultery to a woman or girl are actionable without proof of special damages.

In spite of its harshness, the common law rule has been recognized in the United States and in many instances the courts have held that words imputing want of chastity are not actionable *per se*.[71] The common law has however been repudiated in some jurisdictions, of which Ohio is one, by force of a statute making oral charges of unchastity actionable *per se*.[72] In other jurisdictions, as a result of judicial decisions, the common law is not followed.[73] The rule adopted by the American Law Institute is another example showing that the common law is too harsh and should be changed.[74]

The changes made in the common law of slander up to 1875 by the states is summed up by Justice Clifford of the Supreme Court of the United States in *Pollard v. Lyon*. In the same year

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[68] Theyer v. Eastwick, 4 Burr. 2032, 98 Eng. Rep. 59 (1767); Brand v. Roberts, 4 Burr. 2418, 98 Eng. Rep. 267 (179); Roberts v. Herbert, 1 Sid. 97, 82 Eng. Rep. 993 (1714); Power v. Shaw, 1 Wils. 62, 95 Eng. Rep. 493 (1744).

[69] Lord Campbell in Lynch v. Knight, *supra*, n. 67, said, "I may lament the unsatisfactory state of our law according to which the imputation of words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her."

[70] 54 & 55 Vict., c. 51 (1891).

[71] Douglas v. Douglas, 4 Idaho 293, 38 Pac. 934 (1895); Brooker v. Coffin, 5 Johns. (N.Y.) 188 (1809); Neelands v. Dugan, 100 Ore. 177, 196 Pac. 1116 (1921); Barnett v. Phelps, 97 Ore. 242, 191 Pac. 502 (1920).

[72] OHIO REV. CODE §2901.37 (13383); McDaniel v. Jordan, 164 Ark. 455, 262 S.W. 30 (1924); Ivester v. Coe, 33 Ga. App. 620, 127 S.E. 790 (1925); Holman v. Plumlee, 206 Ky. 275, 267 S.W. 221 (1924); Kosonen v. Waara, 87 Mont. 24, 285 Pac. 668 (1930); Notarmuzzi v. Shevack, 108 N.Y.S. 2d 172 (1951).

[73] Biggerstaff v. Zimmerman, 108 Colo. 194, 114 P. 2d 1098 (1941); Battles v. Tyson, 77 Neb. 563, 110 N.W. 299 (1906); Barnett v. Ward, 36 Ohio St. 107 (1880) (before statute made it a crime).

[74] RESTATEMENT, TORTS §§570, 574. "One who falsely and without a privilege to do so, publishes a slander which imputes to a woman unchastity is liable to her."

Justice Wright of Ohio reiterated this same rule, but in a more crystalized form. Under his statement of the rule for the words to be actionable *per* se they must come within one of the following classes:

I. The words must import a charge of an indictable offense, involving moral turpitude or infamous punishment,
II. Impute some offensive or contagious diseases calculated to deprive the person of society,
III. Tend to injure him in his trade or occupation.[75]

This set of rules would not seem to allow a charge of unchastity to be actionable *per se* but there has been an encroachment on the common law rule of slander by the courts of this state and probably the greatest innovation has been made to benefit women. As early as 1843 the Supreme Court of Ohio stated that words imputing to a woman the want of chastity would be actionable without proof of actual damages.[76] A few years later the supreme court took another step and held that calling a young lady an hermaphrodite was actionable *per se.*[77] This decision was made in forceful language and even though the court had full knowledge of the limitations on the common law and the practice in England they stated they would not allow such a gross wrong to pass without a remedy. The court thought it would be a disgrace to the law not to allow a remedy for an oral charge which brings a girl into ridicule and contempt and excludes her from social intercourse and all hopes of marriage. By allowing this remedy the court created another exception to the common law — that words which have a tendency to wound her feelings, bring her into contempt and prevent her from occupying her rightful position in society are actionable *per se.* Almost twenty years later this exception was apparently recognized in *Alfele v. Wright*[78] and again in 1875.[79] This later case dealing with charging a man with sodomy stated that although repeated appeals had been made to the supreme court to make further innovations on the common law rule, they have been without avail if exception is made for *Malone v. Stewart,*[80] which stands alone. Again in a later case involving a charge of sodomy to a man, the court refused to make further innovation and give the plaintiff a remedy even though the charge was one which reflected the highest degree of disgrace and infamy.[81] This charge today would

[75] Davis v. Brown, 27 Ohio St. 326 (1875).

[76] Wilson v. Runyon, Wright 651 (1843), overruled on other points in Bucklin v. State, 20 Ohio 18 (1851) and French v. Millard, 2 Ohio St. 44 (1853).

[77] Malone v. Stewart, 15 Ohio 319 (1846).

[78] 17 Ohio St. 238 (1867).

[79] Davis v. Brown, 27 Ohio St. 326 (1875).

[80] 15 Ohio 319 (1846).

[81] Melvin v. Weiant, 36 Ohio St. 184 (1880).

come under the exception for imputations of crimes because sodomy has been made an indictable crime for which an infamous punishment can be inflicted.[82]

An imputation that an unmarried woman is pregnant or that she had a bastard child before she was married is actionable *per se* because it amounts to a charge of unchastity.[83] It is important that it be shown that the person so charged was not married at the time she was pregnant or had the child because unchastity is not imputed where it does not appear clearly whether the woman was unmarried *or* married.[84] But of course to charge a married woman with having a child by a person other than her husband would be actionable without alleging special damages. Whether these two instances could come under the exception for oral charges of indictable crimes depends on the statute creating the crimes of fornication and adultery.[85] The Ohio statute does not define either adultery or fornication and the criminal offense is not directed at single acts of adultery or fornication but rather to cohabitation in such a state. Hence it would seem that a mere oral charge that an unmarried woman was pregnant would not impute a crime of fornication, although it would definitely constitute a single act of fornication. A charge that a married woman had a child by a person other than her husband would likewise constitute a single act of adultery, but again the single act alone would not meet the requirements of the Ohio statute. Assuming enough other facts to meet the requirements of the Ohio statute, we still have a problem similar to the one that arose in the discussion of imputations of keeping houses of prostitution[86] because the maximum sentence for fornication and adultery is a fine of not more than two hundred dollars and imprisonment for not more than three months.

Imputations Affecting Business, Employment, Occupation, Office or Profession

The fourth exception recognized in Ohio to the general rule that slander is not actionable without proof of special damages is a false imputation which affects the calling of a particular individual. The early English cases indicate that the terms "trade" and "profession" were to be limited rather narrowly,[87] but it is well settled today that false words spoken of a person's business, employment, occupation, office or profession are actionable *per se*. This extension appeared because of the apparent likelihood that temporal

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[82] See *supra*, n. 27.

[83] Murray v. Murray, 13 Ohio Dec. Rep. 555 (1871).

[84] Parks v. Berry, 307 Ky. 21, 209 S.W. 2d 726 (1948).

[85] Ohio Rev. Code §2905.08 (13024).

[86] *Supra*, p. 318.

[87] Terry v. Hooper, L. Raym. 86 (1663); Fox v. Lapthorne, T. Jones 156 (1681); Barker v. Ringrose, Popham 184 (1626).

damage would result from such false imputations. The only limitation on the various types of callings is that unlawful or unauthorized activities are not protected from defamatory statements.[88] For words spoken of a person's calling to be actionable *per se* they must relate to the person in his specific business, employment, occupation, office or profession and must be of the kind that are incompatible with proper conduct of that particular calling.[89] A simple illustration will show when words relate to his profession: Mrs. Citizen says to her neighbor, of her family physician, that he cannot hang doors properly and she also states that the carpenter she had last week cannot correctly remove an appendix. Obviously the words are not defamatory *per se* because they do not convey an injurious imputation to the carpenter or the physician. On the other hand, if the imputation of lack of ability in the performance of the medical operations were made of the physician the words would then relate to his profession and would be actionable without averment of special damages. The same result would follow if the lack of skill in hanging doors were imputed to the carpenter because it would directly relate to his trade. It is also to be noted that disparaging words to be actionable *per se* must be peculiarly harmful to a person in that particular calling and cannot be words that are equally discreditable to all persons.[90]

Since the basis of this exception is that the person assailed is disgraced or injured in his calling or is exposed to the hazard of losing his office, employment or business; therefore, for the words to be actionable *per se* they must be spoken while the person is actually engaged in such calling.[91] Also, a statement imputing a mere single act of misjudgment in the conduct of his business, employment, occupation, office or profession would not be actionable without proof of special damages unless the single act charged reasonably implies an habitual want of skill which the public is entitled to expect of a person in such a calling. These statements are not actionable without proof of special damages because human beings are not infallible and consequently mistakes are unavoidable.

So much for the general rules and now the imputations will be illustrated by reference to the particular business, employment, occupation, office or profession in which the alleged defamed person is engaged.

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[88] 33 AM. JUR. Libel and Slander §65 (1948); BURDICK'S LAW OF TORTS §48 (4th Ed. 1926); PROSSER, TORTS §92 (1941).

[89] Lohr v. Buffington, 18 Ohio Cir. Ct. (N.S.) 583 (1907); Goldrick v. Levy, 8 Ohio Dec. Repr. 146 (1881).

[90] RESTATEMENT, TORTS §573 (1938).

[91] Dyer v. MacDougall, 93 F. Supp. 484 (E.D. N.Y. 1950).

The general rule as to oral charges against a clergyman that impute to him a mental or moral unfitness to perform the duties of that office or accuse him of acts which are irreconcilable with the discharge of his clerical duties are slanderous *per se*.[92] In Ohio there is very little authority on this point but an early supreme court decision clearly held that to charge a clergyman with drunkenness, when spoken of and concerning him in his office, was actionable *per se*.[93] The court so held because the oral imputation, if true, would tend to deprive him of his salary and may prevent him from obtaining future employment. The reasoning is simple because if the words are believed, they must necessarily deprive him of the respect, veneration, and confidence which a minister of the gospel needs if he is going to be retained by the present congregation or hired by another church group. Following this same line of reasoning, other charges of unfitness for the position would also be actionable *per se*. As was stated in the holding of *Hayner v. Cowden*[94] it is essential that before any damages be recovered for the spoken words it must be shown that they were spoken of and concerning the person in his office. Although *Bigelow v. Brumley*[95] is a libel case it illustrates this principle very well. In that case a clergyman was charged with being a "paid lobbyist for the Single Tax Movement." The Supreme Court of Ohio held that these words were not spoken of him concerning his office and therefore not actionable without proof of special damages.

The Ohio courts have also been willing to grant relief to attorneys and therefore in accordance with the general rules laid down earlier in this section, an action for words spoken of and concerning an attorney would be actionable *per se* if they tend to injure him as a member of his profession.[96] Thus false oral statements indicating that an attorney is lacking the necessary qualifications to practice law are actionable without proof of special damages; whereas mere vituperative language or general abuse of the attorney is not actionable *per se* unless it has reference to his conduct in his profession.[97] Since much of an attorney's time is spent on individual cases, the question arises as to whether a statement imputing a single mistake in the conduct of his profession is actionable *per se*. The test for determining whether the words spoken of and concerning the attorney relating to a particu-

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[92] 33 Am. Jur. Libel and Slander §75 (1948); 25 O. Jur. Libel and Slander §32 (1932); 53 A.L.R. 637 (1928).

[93] Hayner v. Cowden, 27 Ohio St. 292 (1875).

[94] *Ibid.*

[95] 138 Ohio St. 574, 37 N.E. 2d 584 (1941).

[96] Goldrick v. Levy, 8 Ohio Dec. Repr. 146 (1881).

[97] Goodenow v. Tappan, 1 Ohio 61 (1923); Goldrick v. Levy, 8 Ohio Dec. Repr. 146 (1881).

lar case are actionable is sometimes said to be that if they ascribe to the attorney a mere want of information or good management as is compatible with general skill and care in the profession then the words are not actionable *per se*. But if they impute general incompetency, gross ignorance or gross negligence in the discharge of professional duties they are actionable *per se*.[98] Although there is neither a recent Ohio decision nor an Ohio Supreme Court decision on this point, an early lower court case, *Goldrick v Levy*,[99] seems to apply this same general rule.

Very closely related to the protection given to attorneys for false imputations relating to their profession is that given to physicians, surgeons, and dentists. In fact the authority given for decisions involving physicians and surgeons has sometimes been drawn from cases involving false charges made against attorneys.[100] This was done without mentioning the fact that these were different professions. As the attorney, the physician, the surgeon, and the dentist deal with individual cases, therefore it must be determined whether a false oral imputation of a single mistake by one of these professional persons is actionable *per se*. It is well known that doctors, surgeons and dentists can mistake the patient's symptoms, misjudge the diseases, and even underestimate the effect of the medicine. But these errors do not necessarily prejudice him because they do not impute culpable negligence or unskillfulness with respect to his profession. Rather, they illustrate that humans are subject to error. Comparing a charge of negligence or unskillfulness to a physician in the management of a single case with a similar charge to an attorney it would seem that a physician's single error would be considered as an unavoidable error and a matter of human fallibility whereas the attorney's error would more likely be understood as indicating a general incompetence to practice law. Even so, if the false imputation about the physician's profession is such that imputes to him a general ignorance or want of skill in the profession it is actionable without proof of special damages.[101] A very early Ohio case held that before words are actionable *per se* they must relate to the person's professional skill and capacity or his professional integrity.[102] While the theory is true, it was not properly applied in that case. The court held that it was not actionable *per se* to say that a physician was so "steady" drunk that he could no longer get any business. According to mod-

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[98] High v. Supreme Lodge of the World Loyal Order of Moose, 214 Minn. 164, 7 N.W. 2d 675, 144 A.L.R. 810 (1943).

[99] *Supra*, n. 96.

[100] See Note, 144 A.L.R. 815 (1943).

[101] See Note, 124 A.L.R. 554 (1940).

[102] Anonymous, 1 Ohio 83 (1823).

ern day standards this would be actionable without proof of special damages because if reflects on the physician's professional qualifications and capacity.[103] This same type of reasoning has been applied to defamation of teachers[104] and private employees.[105]

The treatment of false imputations affecting public officers and candidates for public office has been treated somewhat differently from that given to professionals and private employes. [106] The broadest immunity that has been impressed on the law of defamation concerning this group of persons is that of fair comment on matters of public concern. [107] Since a man's private character often indicates characteristics that are not compatible with the discharge of his public duties it would seem that these characteristics will often be of public concern. The fact that he put himself before the public affords a legal excuse for making statements that would otherwise be actionable. It is also based on the thought that free public discussion should be encouraged as a means of combating abuses, or offenses, or misconduct on the part of the men in the public field. [108] It is thought that many crucial issues would not be discussed if the commentator had to fear a slander suit. But an early Ohio case held that the mere fact that a person has a public office or is a candidate therefor confers no authority upon the public to utter falsehoods which amount to slander. [109] The court clearly stated that if falsehoods were spoken about these persons then the qualified men would leave public employment and the government would be run by men who had no regard for their character.

As can be readily seen there are two conflicting interests: (1) the public official's or the candidate's reputation and (2) the right to free discussion. Too much favoritism either way will not work. A workable test would be whether or not the particular attack would affect the public official's or the candidate's fitness for his specific position. If it does, then the public has a sufficient interest and is therefore subject to fair comment.

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103 Amick v. Montross, 206 Iowa 51, 220 N.W. 51, 58 A.L.R. 1147 (1928).

104 Mulcahy v. Deitrich, 39 Ohio App. 65, 176 N.E. 481 (1931).

105 Nairn v. Albrecht Gros. Co., 3 Ohio L. Abs. 292 (1925); see note, 6 A.L.R. 2d 1008 (1949).

106 Noel, *Defamation of Public Officers and Candidates* 49 COL. L. REV. 875 (1949).

107 Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E. 2d 340 (1947).

108 Veeder, *Freedom of Public Discussion,* 23 HARV. L. REV. 413 (1910).

109 Seely v. Blair, Wright 358 (1833). See Hallen, *Fair Comment,* 8 TEX. L. REV. 41, 81 (1929) where he cites Publishing Co. v. Moloney, 50 Ohio St. 71, 89, 33 N.E. 921, 926 (1893). "In our opinion, a person who enters upon an office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property."

Conclusion

The law of slander is based on the idea that special damages must be proved before oral words can be actionable. Soon after this principle was laid down the courts realized that the rule was too strict and therefore attempted to make it tolerable by creating exceptions to the rule. Although there is no positive reason why the specific exceptions were singled out, it is probable that the courts thought that from these charges damages would naturally follow and consequently made them actionable *per se*. There was nothing wrong with this theory when it was first used but as time passed this broad idea was not carried forward, and thus only the particular exceptions remained.

Ohio, like many other states in the United States, accepted the established three exceptions to the common law rule discussed above and were very reluctant to extend the exceptions to other situations. This is neatly illustrated by the cases involving charges of sodomy to a man before sodomy was declared a crime by statute.[110] To be sure a charge of this nature would damage a person's reputation, but still the Ohio courts would not extend the exceptions and make the charge actionable *per se*. The charge did not fit neatly into one of their pigeonholes — it did not charge an indictable offense. Had the courts made the gist of the action insult rather than damage the imputation would have been actionable. The refusal to include tuberculosis and smallpox within the exception for contagious diseases also shows the courts' unwillingness to make more exceptions to rule that damages must be proved for slander.

Some of the states have noticed the narrowness and have attempted to create new exceptions by enacting statutes which define what imputations are actionable *per se*. This also gives the courts a chance to interpret the statutes and thereby get away from the strict common law rule. Although Ohio has not passed a statute listing all the imputations that are actionable without proof of special damages, she has made imputations of unchastity to a woman a crime.[111] By so doing, such a charge would be actionable *per se* in that it would come under the exception for imputation of a crime. It is to be noted though that this is really not a great extension because even before the statute the Ohio courts were holding that such a charge would be actionable without proof of damages.[112]

There seems to be no large danger in extending the number

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[110] Melvin v. Weiant, 36 Ohio St. 184 (1880); Davis v. Brown, 27 Ohio St. 326 (1875).

[111] Ohio Rev. Code §2901.37 (13383).

[112] Barnett v. Ward, 36 Ohio St. 197 (1880).

of imputations that should come under the category of slander *per se* although it is admitted that by extending the list more rules will have to be added to an already not too clear set of rules. If merely extending the list is not the best answer because the whole problem is not solved, it is suggested that if all slander were made actionable without proof of damages the problem could be solved or at least there would be fewer and clearer rules. With a rule like this a person could protect his reputation and would not have to be concerned about coming within one of the narrow exceptions or proving special damages. On the other side of the coin is the fact that there would be greater chances for litigation and that freedom of speech would be curtailed for fear of being sued. But if such a law would deter persons from making defamatory statements that certainly would be an advancement toward protecting reputations. As is true in all reforms, the argument is made that the doors of the courts would be thrown wide open to ligitation. In many instances these advance predictions do not materialize. Therefore it is submitted that more good than harm would result from extending the number of actionable *per se* imputations whether it be done by a partial extension or a complete extension to all actions of slander.

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